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In the

Supreme Court of the United States

October Term, 1970

BRYAN JEROME MAKER,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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INDEX TO PETITION

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2-3
Statement of the Case	3-5
Reasons for Granting the Writ	5-8
1. THE WISCONSIN DISORDERLY CONDUCT STATUTE IS VOID SINCE IT IS VAGUE	8-9
2. IF THE STATUTE IS NOT VOID FOR VAGUENESS, THEN IT IS VIOLATIVEOF SUBSTANTIVE DUE PROCESS AND IS OVERBROAD AS APPLIED	9-13
Conclusion	13

CITATIONS

Cases:

Lanzetta v. New Jersey, 306 U.S. 451(1939)	9
Reichenberger v. Conrad, 70-C-65 (W.D. Wis. Nov. 24, 1970)	12
Stanley v. Georgia, 394 U.S. 557(1969)	12
State v. Givens, 28 Wis. 2d 109, 135 N.W. 2d 780 (1965)	5

State v. Zwicker, 41 Wis. 2d 497, 164 N.W. 2d 512 (1969) 5,6

Terminiello v. Chicago, 337 U.S.1(1948) 10

Thompson v. Louisville, 362 U.S.199(1960) 11,12

United States v. B. & H. Dist. Corp., 70-CR-67 (W.D. Wis. Nov. 24, 1970) 12

Winters v. New York, 337 U.S.507 (1947) 8

Wolin v. Port of N.Y. Authority, 392 F.2d 83 (CA 2 1968) 11

Statutes:

Title 28, U.S.C. 1257 2

Wis. Stat. §947.01(1) (1967) 3

Others:

Black's Law Dictionary; Fourth Edition (1951) 9

INDEX TO APPENDIX

APPENDIX A:

1. Opinion of the Wisconsin Supreme Court 1-8

APPENDIX B:

2. Opinion of the Circuit Court, Criminal Division 9-11

APPENDIX C:

3. Opinion of the Milwaukee County Court 11-14

IN THE

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October Term, 1970

No. _____

BRYAN JEROME MAHER,

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v.

STATE OF WISCONSIN,

Respondent.

PETITIONER FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The petitioner, Bryan Jerome Maher, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court for the State of Wisconsin entered in the matter of State v. Maher on November 3, 1970.

OPINIONS BELOW

The opinion rendered by the Wisconsin Supreme Court, Circuit Court for Milwaukee County and the proceedings before the Misdemeanor Branch of the County Court for Milwaukee County appear in the Record certified herein.

The opinion of the Wisconsin Supreme Court is found at 48 Wis. 2d 612, ____N.W. 2d____. The Circuit and County Court opinions and proceedings are not reported.

JURISDICTION

The Wisconsin Supreme Court decided this matter on November 9, 1970. No rehearing was sought in the Wisconsin Supreme Court. This petition for certiorari was filed within 90 days of the entry of the above decision. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. §1257.

QUESTION PRESENTED

Is the Wisconsin "disorderly conduct" statute, § 947.01(1), unconstitutional on its face and as applied since the statute proscribes conduct clearly protected under the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fourteenth Amendment to the United States Constitution:

(1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Wisconsin Statute § 947.01(1):

Disorderly Conduct. Whoever does any of the following may be fined not more than $100.00 or imprisoned not more than 30 days: (1) In a public place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance:

STATEMENT OF THE CASE

On October 1, 1968, the Petitioner, Bryan Jerome Maker, performed as a guitarist and singer with a "rock band" at a benefit performance in a tavern-type dance hall in the City of Milwaukee, Wisconsin. The band in which Petitioner performed was one of several that entertained that evening and the arresting officer characterized the environment as "psy-

chedelic" and the spectators as "hippies". (County Court Transcript (CtCT.) P. 6).

At this benefit performance, the Petitioner appeared, clad solely in an athletic supporter, his body partially covered by his guitar, and extensive body paint. The body paint was of the design of red and white stripes from ankles to midchest, and blue paint with stars on his chest and face. (CtCT. P. 3). The Petitioner explained that his costume was a mode of satirizing the hippies and protesters who constituted the audience as the above mentioned benefit performance. (CtCT. P. 9) The audience response to the performance of the Petitioner was a clapping of their hands - some stood on tables and yelled. (CtCT. P. 6).

On October 1, 1968, the Petitioner was arrested for a violation of Section 947.01 of the Wisconsin Statutes of 1967. A criminal complaint and warrant were issued on this same date. On October 23, 1968, after a trial to the court in Branch 4 of the County Court of Milwaukee County, the Petitioner was adjudged guilty and sentenced to a term of thirty (30) days imprisonment in the Milwaukee County Jail. (CtCT. P. 11). On this same date the Petitioner filed a Notice of Appeal to the Circuit Court of Milwaukee County and, after the bond was posted, execution of the County Court judgment was stayed.

Upon his appeal to the Criminal Division of the Circuit Court for Milwaukee County, the Circuit Court judge affirmed the decision of the County Court judge, and found the defendant guilty of disorderly conduct on March 7, 1969.

The defendant was subsequently incarcerated in the Milwaukee County Jail and has since served his sentence as imposed by the Circuit Court of Milwaukee County.

Subsequently, and after the defendant had completed serving his sentence in the Milwaukee County Jail, he filed his Notice of Appeal to the Wisconsin Supreme Court. Oral arguments were had to that Court on October 9, 1970, and the Supreme Court for the State of Wisconsin decided the above matter on November 3, 1970. The issue as to the constitutionality of Wisconsin Statute § 947.01, "disorderly conduct", was raised as an issue to the Wisconsin Supreme Court and this issue was decided on its merits by that court. The Wisconsin Supreme Court stated the following:

> Here the appellant urges that we find unconstitutional as overbroad the Wisconsin Statute prohibiting disorderly conduct. Here, as in earlier cases, we uphold the constitutionality of that statute finding it to be a proper legislative response to the siamese twin-like mandate to maintain public order and protect personal freedom. . . . (footnotes omitted). 48 Wis. 2d 612, 615 (1970).

REASONS FOR GRANTING WRIT

The crime of disorderly conduct requires the proof of two elements. First that the conduct falls within one of the seven enumerated categories and second, that the conduct "tends to cause or provoke a disturbance." State v. Givens, 28 Wis. 2d 109, 135 N.W. 2d 780 (1965); State

v. Zwicker, 41 Wis. 2d 497, 164 N.W. 2d 512 (1969), appeal dismissed 396 U.S. 26, 90 S.CT. 199, 24 L.Ed. 2d 147 (1970). However, the seventh category of conduct stated, i.e., "otherwise disorderly conduct", is not a separate category from the earlier six but rather conduct which is "conduct similar thereto." State v. Zwicker, supra, held that the disorderly conduct statute was not overbroad, 41 Wis. 2d at 511, and stated the purpose of the statute as follows:

> The design of the disorderly conduct statute is to proscribe substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons.

In this case the Wisconsin Supreme Court has again found the statute constitutional and the conduct of the defendant-appellant to be "indecent and disorderly conduct within the statutory prohibition. . . ." 41 Wis. 2d at 617.

In light of the interpretation given to the words "otherwise disorderly conduct" in Zwicker , the use of the words "disorderly conduct" in this case by the Wisconsin Supreme Court adds nothing to the finding made that Maker's conduct was "indecent".

The finding of indecency by the Wisconsin Supreme Court can be based on three possible grounds. First, that the paint worn by Maker was indecent in an of itself. Second, that the combination of the paint and his limited attire was indecent. Or thirdly, that his limited at-

tire was indecent.

From the opinion of the Wisconsin Supreme Court it appears that only the third ground was considered in its finding that Marker's conduct was indecent since the Court stated:

> ATTIRE. The only article of clothing worn by the defendant was jockstrap or athletic supporter. As the complaint states, he was "wearing only a supporter of his private parts and paint on his body." One picture is certainly worth several thousand words in describing the attire or lack of attire of the defendant, but it is enough here to state that the photographs establish he wore only a type of supporter or suspensory ordinarily worn under outer garments, usually under trunks in a gym. 48 Wis. 2d at 617.

It should, however, be pointed out that the first Court to consider this matter, County Court, found the following to characterize Marker's performance:

> THE COURT: Finding of guilty. I think it's an obscene, indecent, filthy, perverted act. Give me some more words somebody? . . . . You don't have to be very smart to know that he was portraying the American flag in an obscene way, and you ought to be ashamed of yourself. . . . . I want to clean out this scum that has invaded Milwaukee. I'm not a prude but this is filth, this ugly type of thinking. . . . . Yes, the picture, take a look at the pictures, that's a portrayal of the American flag, the stars and

> stripes with a field of blue with the stars on top, and that's what he was doing, because his kind thinks that the flag is a rag, -- his kind, and the mules in the audience who laughed at the Court are no better than this scum. (CtCT. P. 13, App. C.14).

The Circuit Court, which first heard the case on appeal, stated the following:

> I think it's a very simple case that his actions were disorderly under the circumstances which conduct, namely, the dressing as he did here in the photographs and being body-painted as an American Flag, did cause and provoke a disturbance. (Circuit Court Transcript (CtCT.) P. 17, App. B.12)

1. THE WISCONSIN DISORDERLY CONDUCT STATUTE IS VOID SINCE IT IS VAGUE.

> It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face . . . . The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement . . . . Men of common intelligence can be required to guess at the meaning of the enactment. Winters v. New York, 337 U.S. 507, 509, 515 (1947).

> No one may be required at peril of life, liberty, property to speculate as to the mean-

ing of penal statutes. All are entitled to be informed as to what the State commands or forbids. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

The term "indecent" in the Wisconsin disorderly conduct statute causes that statute to suffer from vagueness and is thus void on its face. This particular phrase i.e., "indecent" as used in the disorderly conduct statute, has been given no judicial gloss or interpretation in Wisconsin.

"Indecent" has been defined the following way:

> Offensive to common propriety; offending against modesty or delicacy; grossly vulgar; obscene; lewd; unseemly; unbecoming; indecorous; unfit to be seen or heard. Hutcheson v. State, 24 Fa. App. 54, 99 S.E. 715; Wood v. State, 45 Ga. App. 783, 165 S.E. 908. Black's Law Dictionary; Fourth Edition (1951).

The words used to define "indecent" are pregnant with vagueness and do not allow for any degree of precision. Men of common intelligence must guess at its meaning.

2. IF THE STATUTE IS NOT VOID FOR VAGUENESS, THEN IT IS VIOLATIVE OF SUBSTANTIVE DUE PROCESS AND IS OVERBROAD AS APPLIED.

The conduct engaged in by Maker must be considered to be symbolic speech activity. He was performing as a member of a rock band to

an audience of "hippies": the environment characterized by the police officer as "psychedelic". Petitioner's avowed purpose, in dressing and acting as he did, was to satirize the audience. If this type of conduct is proscribed by the statute, then the statute is overbroad as applied and it violates petitioner's rights to substantive due process.

The Wisconsin Supreme Court makes no mention in its opinion to Terminiello v. Chicago, 337 U.S. 1 (1948). Yet the Court stated therein:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, (315 U.S. pp. 571, 572, 86 L.Ed. 1034, 1035, 62 S.Ct. 766), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See Bridges v. California, 314 U.S. 252,262, 86 L.Ed. 192, 202 62 S.Ct. 190, 159 ALR 1346; Craig v. Harney, 331 U.S. 367, 373, 91 L.Ed. 1546, 1550, 67 S.Ct. 1249. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political

or community groups. 337 U.S. at 4.

And in Wolin v. Port of New York Authority, 392 F. 2d 83 (CA2 1968), the Court stated the following:

> "Where the issue involved the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further; does the character of the place, the patterns of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended made it an appropriate place for the communication of views..." 392 F.2d at 87.

These criteria were clearly met by the Petitioner. The character of the place was described by an arresting officer as a tavern-type dance hall. Mr. Maker certainly did not alter this character by performing as an entertainer. The population at the scene were referred to as "hippies and protestors". His performance was geared to the audience, specifically, his appearance was a satire of the audience itself. As an entertainer appearing at a benefit fun-fest Mr. Maker's appearance and performance were totally in keeping with the context in which they must be evaluated.

When one couples the broad scope of the Terminiello holding with the previously quoted language of Wolin, supra, it becomes inescapable that Mr. Maker's activities in no way constituted an offense. Not only was his activity protected, he did not cause a disturbance. Thompson v.

Louisville, 362 U.S. 199 (1960). The sole result of his performance was the clapping of hands and the audience yelling, some standing on tables. From the record, it appears that this was a mere indication of audience approval.

Should it be assumed for arguments sake that the defendant's conduct was indecent or obscene, the punishment of the defendant for this conduct in the circumstances of this case, is unconstitutional.

> "(A) n obscene play, dance or performance" . . . cannot be prohibited by government unless the prohibition is confined to situations in which there is a conflict with one or both of these constitutionally permissible goals or interests. That is, an obscene play, dance or performance cannot be prohibited unless it occurs in a situation in which children are exposed to the obscenity or in which the sensibilities of unwilling adults are assaulted. Reichenberger v. Conrad, 70-C-65 (W.D. Wis. Nov. 24, 1970).

see also United States v. B & H. Dist. Corp., 70-CR-67 (W.D. Wis. Nov. 24, 1970). The reasoning of the above cases is based on Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1234, 22 L. Ed. 2d 542 (1969). Here, as in Reichenberger, there were persons viewing a performance in a tavern. Although here the conduct has allegedly "indecent" and not obscene, as in Reichenberger, clearly the same reasoning should apply. In Stanley, this Court stated:

> But we think that mere categorization of these films as "obscene" is insufficient

justification for such a drastic invasion of personal liberties, guaranteed by the First and Fourteenth Amendments. . . . Our whole constitutional heritage rebels at the though of giving government the power to control men's minds. 394 U.S. at 565.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted,

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Appendix A.1

State No. 51

August Term, 1970

STATE OF WISCONSIN : IN SUPREME COURT

STATE OF WISCONSIN,

Respondent,

v.

BRYAN JEROME MAKER,

Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN A. FIORENZA, County Judge of Milwaukee county, Presiding. Affirmed.

FACTS

The defendant was charged with disorderly conduct, contrary to sec. 947.01, Stats., the complaint stating that the defendant, on October 1, 1968, ". . . did unlawfully engage in disorderly conduct under circumstances in which such conduct tended to cause and provoke a disturbance, to-wit: defendant performed on a stage at the Bastile tavern, situated at 2311 South Howell Avenue, in the City of Milwaukee, in said County, wearing only a supporter of his private parts and paint

on his body. . ."

On October 23, 1968, the action was tried in the misdemeanor branch of the county court of Milwaukee, Judge Christ T. Seraphim presiding. The defendant was found guilty, the court finding his conduct to be "indecent" and "obscene." Defendant appealed the conviction to the circuit court.

On March 7, 1969, a trial de novo was held before acting circuit judge John A. Fiorenza. The district attorney and defendant's attorney stipulated that the testimony and proceedings had before Judge Seraphim would stand as the testimony and record in the case before Judge Fiorenza. The court found the defendant guilty of disorderly conduct, finding that ". . . his (defendant's) actions were disorderly under the circumstances, . . . (and) did cause and provoke a disturbance." Defendant was sentenced to thirty days under the "Huber Law," sec. 56.08, Stats. Defendant appeals.

ROBERT W. HANSEN, J. The maintenance of ordered liberty is a basic objective of our constitutional form of government. Order and liberty are alike to be protected, neither to be extinguished in favor of the other. Order without liberty is tyranny. Liberty without order is anarchy. The constitutional mandate is that both excesses be avoided.

1/ ". . . The constitutional guarantee of liberty implies the existence of an organized society maintaining a public order, without which lib-

(Con't. on p. Appendix A.3)

In any challenge to the constitutionality of a statute defining and prohibiting disorderly conduct, as to words spoken [2/] or conduct engaged in, [3/] the right to maintain the public peace must be considered along with the imperative to protect constitutionally assured personal freedoms. Here the appellant urges that we find unconstitutional as overbroad the Wisconsin statute prohibiting disorderly conduct. [4/] Here, as in earlier

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erty itself would be lost in the excesses of anarchy. . . ." Cox v. Louisiana (1965), 379 U.S. 536, 554, 85 Sup. Ct. 453, 464, 13 L.Ed. 2d 471.

2/ ". . . The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. . . ." Id. at page 554.

3/ United States v. O'Brien (1968), 391 U.S. 367, 377, 88 Sup. Ct. 1673, 20 L.Ed. 2d 672. (Draft card burning, though assumed to be symbolic conduct was subject to regulation in light of an "important or substantial government interest.") See also: Tinker v. Des Moines Independent Com. Sch. Dist. (1969), 393 U.S. 503, 89 Sup. Ct. 733, 21 L.Ed. 2d 31.

4/ Sec. 947.01, Stats., providing: "Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days. (1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, un-

(Con't. on p. Appendix A.4)

cases, 5/ we uphold the constitutionality of that statute finding it to be a proper legislative response to the Siamese twin-like mandate to maintain public order and protect personal freedoms, repeating that:

> "The language of the disorderly conduct statute is not so broad that its sanctions may apply to conduct protected by the constitution. The mere propounding of unpopular views will not qualify for conviction. The statute does not proscribe activities intertwined with protected freedoms unless carried out in a manner which is violent, abusive, indecent, profane, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance. Prohibition of conduct which has this effect

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reasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; or (2) With intent to annoy another, makes a telephone call, whether or not conversation ensues."

5/ State v. Givens (1965), 28 Wis. 2d 109, 135 N.W. 2d 780; State v. Zwicker (1969), 41 Wis. 2d 497, 164 N.W. 2d 512, dismissed (1970), 396 U.S. 26, 90 Sup. Ct. 199, 24 L.Ed. 2d 146. See also: Zwicker v. Boll (W.D. Wis. 1967), 270 Fed. Supp. 131, 135, affirmed per curiam (1968), 391 U.S. 353, 88 Sup. Ct. 1666, 20 L.Ed. 2d 642; Soglin v. Kauffman (W.D.

(Con't. on p. Appendix A.5)

does not abridge constitutional liberty."

This court's emphasis upon the relatedness of conduct and circumstances in the statute is no more than a recognition of the fact that what would constitute disorderly conduct in one set of circumstances, might not under some other. When a famed jurist observed, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," 7/ the comment related to the crowdedness of the theater as well as to the loudness of the shout. It is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation.

The statute upheld, the issue on appeal becomes: Was the conduct of the defendant one of the types of conduct enumerated in the statute and, if so, was it carried out "under circumstances in which such conduct tends to cause or provoke a disturbance?" As this court has repeatedly stated, the test on appeal is "whether this court can conclude the trier of the facts could, acting reasonably, be convinced to the required degree of certitude by the evidence which it had a right to believe and accept as true." 8/ Here that issue is narrowed by the absence of

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Wis. 1968), 286 Fed. Supp. 851.

6/ State v. Zwicker, supra, at page 509.

7/ Schenck v. United States (1919), 249 U.S. 47, 52.

8/ Lock v. State (1966), 31 Wis. 2d 110, 114,
(Con't. on p. Appendix A.6)

conflict in the testimony as to the events leading up to the arrest of the defendant on a charge of disorderly conduct. Two witnesses testified, the arresting officer for the state, the defendant for the defense, and their testimony is not in conflict on material aspects of the case. However, the matter of the relatedness of the conduct to the circumstances requires an analysis of the exact situation presented to the trial court by the testimony and the photographs introduced into evidence.

PLACE. The place involved was a tavern on the south side of the city of Milwaukee, known as the Bastile.

EVENT. The evening of the arrest was a special occasion in that a number of orchestras or musical groups appeared in sequence to entertain the audience.

ROLE. The defendant appeared as a musician member of an orchestra or musical group that was part of the evening's entertainment.

ATTIRE. The only article of clothing worn by the defendant was a jockstrap or athletic supporter. As the complaint states, he was "wearing only a supporter of his private parts and paint on his body." One picture is certainly worth several thousand words in describing the attire or lack of attire of the defendant, but it is enough here to state that the photographs establish he wore only a type of supporter or suspensory

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142 N.W. 2d 183.

ordinarily worn under outer garments, usually under trunks in a gym. Holding as we do that the defendant's dressing as he did here constituted indecent and disorderly conduct within the statutory prohibition, did it tend to create or provoke a disturbance?

INTENT. The defendant testified that he appeared as he did to "satirize" the audience. Asked by his attorney, "As a matter of fact, you were satirizing the so-called Hippies and protestors who were there on the night in question?", the defendant answered, "That's right." As to the audience present, the police officer testified, ". . . these were supposedly Hippies that were there at the time." Defense counsel argues that this established that "You have an audience that's accustomed to the unusual." That may well be, but it is a not unreasonable inference from the testimony that the defendant intended to seek and secure a definite reaction from the particular audience then present by dressing or undressing as he did.

REACTION. Defendant's inferable expectation of securing an audience reaction was not disappointed. While the record is brief, almost sketchy, the crowd's reaction to the attire or conduct of the defendant was not a delayed response. It is not disputed that as the police officer testified, "The spectators were all standing . . . all looking up on the stage. . . Some were standing on tables, yelling loudly. . ." It might be a reasonable inference that the scene described was little more than a counterpart of a Munich brauhaus scene with high-energied young folks jumping up on beer-greasy tables to shout,

"Ein prosit," and showing approval or disapproval of a performer. However, it is as a reasonable alternative inference that, in a crowded tavern, there existed a situation of mounting disorder, accumulating tension and predictable explosiveness. This inference the trial court drew finding that the defendant did in fact "cause and provoke a disturbance."

ARREST. Entitled to conclude that danger and disturbance existed, the single police officer present placed the defendant under arrest, charging him with disorderly conduct in light of the existing disturbance and reasonably predictable more serious disorder. That he did not also place under arrest members of the audience for disorderly reactions to defendant's conduct appears to have been a matter of logistics. Placing others under arrest might well have precipitated the explosion the officer had reason and right to seek to avoid. In any event he acted to remove from the scene the person whose conduct was in his judgment tending to provoke and in fact causing the disturbance. We deal only with the validity of that arrest and the subsequent conviction in court of the defendant.

Given this time and place, this conduct and these circumstances, we find that the evidence, and entirely reasonable inferences to be drawn therefrom, do warrant and justify the trial court finding that the defendant was guilty of a violation of sec. 947.01, Stats., in that ". . . his actions were disorderly under the circumstances . . . (and) did cause and provoke a disturbance."

By the Court. -- Judgment affirmed.

PROCEEDINGS

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Page of Record

67 COURT: Well, unfair or not, in relation to other activities going on in the city I'm not concerned with this. I'm only concerned with one case, whether or not this defendant did commit the crime of disorderly conduct on the particular date in question. I'm not here to decide if there was any indecent exposure or if what he did shows any deprivation of character. I'm not even here to determine if his action in the way he's painted up like the American Flag
68 with only a jock strap on shocks the conscience of the community. I'm not going to decide that. This is a very simple case. Did what this man do, whether he's being paid for it or not, was that disorderly conduct which would tend to provoke a disturbance?

MR. EISENBERG: And does the record show it, right, Judge?

COURT: Just look at Page 6: "What were the spectators doing? Clapping their hands; some were standing on tables and yelling," and to say that it's common for people in a tavern to clap to see a performance, that might be; to yell, well, maybe; but to stand on tables? To clap, yell, and stand on tables?

MR. EISENBERG: It was very crowded. There wasn't even seating for everybody that --

COURT: I'm not going to take that type of argument that it was crowded and the people had

to stand on tables. That is not the normal course of procedure for people to do.

This man was performing. They were standing on tables and yelling and clapping their hands, and if that isn't a disturbance, I don't know what would be. It's not tending to cause a disturbance, it is a disturbance in this Court's opinion, and there is no question that his activities caused
69 the disturbance. To see a man painted up like the American Flag and playing his guitar in public at a public place where they pay to get in under the pretext of a benefit, it is a disturbance.

I know of no standard in the community that says that people can stand on the tables at a tavern to show their liking or disliking for a particular act.

I know of no rule of law that says the Hippie community of the city can in any way behave differently than the other average citizens. They are not entitled to any special treatment by the law. The fact is people were motivated to clap, yell and stand on tables.

I think it's a very simple case that his actions were disorderly under the circumstances which conduct, namely, the dressing as he did here in the photographs and being body-painted as an American Flag, did cause and provoke a disturbance.

Therefore, this court is going to find him guilty of this particular charge. I'm not here to set up his morals. If I were here to comment on his

morals, I might have much more stronger words for him I might have to determine that he has some type of demented mind; that he should really be looked after psychiatrically.

To determine this is a comic performance, no clown ever dressed like this. I've been to many circuses and there is no clown that's going to dress like this without any clothes on in just a jock strap.

MR. EISENBERG: This might be a more sophisticated audience than you find at a circus. There are no children here. You have children at a circus. You have to be a certain age to get into this place.

COURT: I don't care if there are children or not. Sophistication --, again I'm starting to moralize now and these are my own personal views and I'm not going to comment any more on it, but his actions, being dressed this way, did tend to create a disturbance and, therefore, this Court will find the defendant, Bryon Jerome Maker, guilty of the crime of disorderly conduct.

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PROCEEDINGS

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MR. EISENBERG: No further questions.

THE COURT: Finding of guilty. I think it's

an obscene, indecent, filthy, perverted act. Give me some more words somebody?

MR. EISENBERG: Let me ask you in good conscience --

THE COURT: Take a look at those pictures.

MR. EISENBERG: I saw them. I'm just asking this, is this any more obscene than the performances that go on at the Ad Lib, at the Brass Rail, at many of the downtown so-called strip places?

THE COURT: Absolutely, absolutely, no stripper would dare get on stage with a costume of this type in the City of Milwaukee, she would be arrested in a second. You don't have to be very smart to know that he was portraying the American flag in an obscene way, and you ought to be ashamed of yourself. How long have you lived in Milwaukee?

THE DEFENDANT: All my life, sir.

THE COURT: Thirty days under the Huber Law.

MR. EISENBERG: Your Honor, would you consider a money fine?

THE COURT: No I wouldn't, I want to clean out this scum that has invaded Milwaukee. I'm not a prude but this is filth, this ugly type of thinking. Have you taken steps to report this tavern to the common council?

THE OFFICER: It has been taken care of, sir.

MR. EISENBERG: This young man has no connection with the tavern.

THE COURT: The tavern permitted this act to go on, the tavernkeeper, and we don't need
36 any tavernkeepers of this type in Milwaukee, we don't need any scum of this type in Milwaukee.

MR. EISENBERG: This boy has no previous record, Your Honor.

THE COURT: He has it now. What do you mean he has no previous record?

MR. EISENBERG: What previous criminal record does he have?

THE COURT: Driving too fast for conditions, carrying concealed weapon, disorderly, operating after revocation, failure to stop while emerging from alley.

(Laughter in the courtroom.)

THE COURT: I'll remove the first individual that demonstrates in any way. I'm reading the entire record. And if I get that mule that brayed he'll wish he never saw Christ Seraphim. Deputy, who made that noise, can you spot anyone? Pick him up. Has any spectator noticed?

MR. EISENBERG: Your Honor, the carrying concealed weapon --

THE COURT (continuing): Drinking beer in auto, reckless driving, auto speed, minor misrepresenting age, muffler, no license, no license, these

are criminal acts.

MR. EISENBERG: Those are traffic offenses, aren't they, Your Honor?

THE COURT: Well, they are wilfull, intentional acts of driving without a license. He now goes to jail for thirty days as he deserves for desecrating the American flag.

MR. EISENBERG: Your Honor, I don't think -- is there anything in the evidence to support that?

THE COURT: Yes, the picture, take a look at the pictures, that's a portrayal of the American flag, the stars and stripes with a field of blue with the stars on top, and that's what he was doing, because his kind thinks that the flag is a rag, -- his kind, and the mules in the audience who laughed at the Court are no better than this scum.

MR. EISENBERG: I say to Your Honor, as to this boy's sentiments, you are mistaken, he is proud to be an American.

THE COURT: He doesn't look like a good American to begin with. All right, take him away.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1321

BRYAN JEROME MAKER,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported as *State v. Maker* (1970), 48 Wis. (2d) 612, N. W. (2d) . The county and circuit court proceedings are not reported.

JURISDICTION

The jurisdictional requisites are set forth in the petition.

QUESTION PRESENTED

Whether the Wisconsin disorderly conduct statute (sec. 947.01 (1), Wis. Stats.) was unconstitutionally or otherwise improperly applied to the petitioner herein.

STATUTE INVOLVED

The Wisconsin statute involved (sec. 947.01 (1), Wis. Stats.) is set forth in the petition.

STATEMENT OF THE CASE

The statement in the petition is adequate.

ARGUMENT

The question of the vagueness of Wisconsin's disorderly conduct statute was not raised in the state court proceedings and is, therefore, not properly before this court. *Ellis v. Dixon* (1955), 349 U. S. 458, 75 S. Ct. 850, 99 L. Ed. 1231. The statute has, in any event, been upheld as facially constitutional. *Zwicker v. Boll* (W.D. Wis., 1967), 270 F. Supp. 131, affirmed *per curiam* 391 U. S. 353, 88 S. Ct. 1666, 20 L. Ed. (2d) 642; *State v. Zwicker* (1969), 41 Wis. (2d) 497, 164 N. W. (2d) 512, appeal dismissed 396 U. S. 26, 90 S. Ct. 199, 24 L. Ed. (2d) 147.

The question before this court is, rather, whether the statute has been unconstitutionally or otherwise improperly applied to the petitioner. The Wisconsin Supreme Court determined that the evidence, and the inferences properly drawn therefrom, were sufficient to support the finding of guilty, and affirmed the conviction. For the purposes of the instant petition, the State of Wisconsin will rest on the unanimous decision and determination of its highest court.

CONCLUSION

It is respectfully submitted that the petition should be denied; and, if granted, that the questions be limited to the statute's application to the acts of this petitioner.

Respectfully submitted,

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